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No. 08-1278

In The

Supreme Court of the United States

LYNN MAGNANDONOVAN,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Five

BRIEF IN OPPOSITION

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Respondent City of Los Angeles submits a Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Lynn Magnandonovan to review the judgment of the California Court of Appeal, Second Appellate District, Division Five, filed on October 29, 2008. Respondent asks that certiorari review be denied.

On January 10, 2007, petitioner's trial counsel sent a letter to the Second Appellate District's Administrative Presiding Justice Roger Boren requesting the Second District to recuse itself. Pet. at p. 4.

Justice Laurie Zelon, while still a judge of the Los Angeles County Superior Court, had testified that petitioner had appeared in her courtroom in 2001 on a discovery motion in a criminal proceeding. She testified that petitioner was at times disrespectful. Pet. App. at pp. 38, 46-47.

Administrative Presiding Justice Boren requested Division Five's Presiding Justice, Paul Turner, to respond to counsel's request for recusal. Presiding Justice Turner wrote,

> After reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would not entertain a doubt as to our capacity to remain impartial. At present, the Division Five justices decline to recuse themselves. If facts develop at a later date that cause any or all of us to change our minds, we will of course individually or collectively recuse ourselves.

Pet. App. at p. 65.

The question presented is whether the Due Process Clause of the Fourteenth Amendment required the California Court of Appeal, Second Appellate District to recuse itself.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

Pursuant to Supreme Court Rule 15.2, respondent suggests that the following misstatement of fact or law appears in the petition:

> The justices of the California Court of Appeal should have recused themselves because their decision depended on the majority's subjective assessment of the strength and credibility of trial testimony by another justice of the same appellate court who, while previously a trial judge, had testified against plaintiff at her trial.

Pet. at p. 3.[1]

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[1] The testimony of Justice Zelon was relevant but cumulative. On May 17, 2002, then Superior Court Judge (now Court of Appeal Associate Justice) Zelon was interviewed by Deputy City Attorney Zna Portlock Houston, who conducted the city's investigation into the charges against petitioner. Judge Zelon stated that petitioner had appeared in her courtroom in 2001 on a discovery motion and was difficult and disrespectful to the court. Pet. App. at pp. 38-39.

By the time of trial, Judge Zelon had been appointed to the Court of Appeal. Associate Justice Zelon described petitioner's conduct during superior court proceedings. Justice Zelon described

(Continued on following page)

This sentence misstates the holding of the California Court of Appeal. The majority opinion does not depend "on the majority's subjective assessment of the strength and credibility of trial testimony by another justice of the same appellate court who, while previously a trial judge, had testified against plaintiff at her trial." To the contrary, the California Court of Appeal held that the city "presented strong, extensive largely uncontradicted evidence plaintiff, a public prosecutor, had repeatedly conducted herself in a wholly unacceptable manner – which led to four members of the city attorney's office to agree that plaintiff's employment should be terminated . . . " Pet. App. at p. 28.

A. Background

The appeal which is the subject of the petition involves a retaliation case in which petitioner, a now "terminated deputy city attorney, among other things admitted she angrily threatened a superior court commissioner that he would have to answer to his creator for a judicial ruling." Pet. App. at p. 2.

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one incident saying: "As best I can recall it now, she referred to the fact that she represented the six million citizens of the City of Los Angeles and that I should explain to them why I was delaying the trial in this case." Justice Zelon testified, "I believe that remarks of that nature in open court on the record show a profound disrespect for the role of the court in a criminal prosecution and the rights of the parties." Pet. App. at p. 47.

The City of Los Angeles, appealed from a judgment, after a jury trial, in favor of petitioner, Lynn Magnandonovan. The city contended among other things that petitioner failed to exhaust her administrative remedies under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) and that there was no substantial evidence that the city's reasons for discharging petitioner were a pretext for unlawful retaliation. Pet. App. at pp. 2-3.

The court rejected the city's arguments that petitioner failed to exhaust her FEHA administrative remedies by failing to file a retaliation claim. Pet. App. at p. 12.

The Court of Appeal then addressed the question of whether the FEHA cause of action was supported by substantial evidence. The city argued that there was no substantial evidence to support petitioner's contention that the city's reasons for discharging her were a pretext for illegal retaliation. Pet. App. at p. 3.

In reliance upon *Yankowitz v. L'Oreal USA, Inc.*, 36 Cal.4th, 1028, 1042 (2005); *Arteaga v. Brink's, Inc.*, 163 Cal.App.4th 327, 356 (2008); and *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 476-479 (1992), the court concluded that this case was subject to the three-stage burden shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805 (1973). The court said petitioner established a prima facie case for retaliation, but "her pretext evidence was insufficient as a matter of law to support a reasonable inference defendant acted with an illegal

motive." Pet. App. at p. 22. In support of this conclusion the court relied upon three cases: *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 355 (2000); *Reeves v. Safeway Stores, Inc.*, 121 Cal.App.4th 95, 112 (2004) and *Yankowitz v. L'Oreal USA, Inc.*, supra, 36 Cal.4th, 1028, 1042. Pet. App. at pp. 19-20.

The court held that,

> There was substantially uncontradicted evidence plaintiff had a long history of inappropriate conduct before judicial officers, for which she had been counseled, and which culminated in the incident involving then Commissioner, now Judge, Biderman. This history of unprofessional conduct, and of complaints about plaintiff's behavior, was documented in the notice of proposed termination and its attachments, and corroborated by testimony at trial, including that of judges, coworkers, and supervisors in the city attorney's office. Much of the evidence came from superior court judges before whom plaintiff had appeared and who had been interviewed during the city's investigation. These judges had no knowledge of plaintiff's initial Department of Fair Employment and Housing administrative complaint. Or even if they did, none of the judges had any motivation to retaliate against plaintiff for filing the Department of Fair Employment and Housing administrative complaint. Moreover, Mr. Delgadillo, the city attorney, cannot be expected to retain as a public prosecutor – a position of great power and even greater

> responsibility – an attorney who conducts herself or himself in a manner antithetical to that position.

Pet. App. at p. 29.

B. Petitioner's Own Testimony Provided The City With A Legitimate Non-Retaliatory Reason For Terminating Her Employment.

The California Court of Appeal observed that the incident that was the immediate trigger of the city's investigation into complaints about petitioner's misconduct occurred on November 27, 2001, in Commissioner (now Judge) Joseph Biderman's courtroom. At trial petitioner admitted to the following:

> On November 27, 2001, she failed to timely appear for a probation violation hearing in Commissioner Biderman's courtroom. Plaintiff [Petitioner Lynn Magnandonovan] telephoned Commissioner Biderman's courtroom clerk, Ms. Jones. Plaintiff learned that when she failed to appear, Commissioner Biderman had taken the matter off calendar. Plaintiff believed that as a result of Commissioner Biderman's action, the defendant's probation would be terminated. Ms. Jones read Commissioner Biderman's minute order to plaintiff. Thereupon, plaintiff told Ms. Jones that part of what Commissioner Biderman had written in the court file was a lie. Plaintiff accused Commissioner Biderman of having a "personal vendetta" against her. Plaintiff said she was so upset about what Commissioner

> Biderman had done that, '[M]aybe I would file a complaint against him.' In the telephone conversation, plaintiff told Ms. Jones that Commissioner Biderman "would have to answer to the creator" for his actions.

Pet. App. at p. 18.

The California Court of Appeal held that additional trial testimony indicated that,

> Ms. Jones advised Commissioner Biderman about the telephone call. Ms. Jones told Commissioner Biderman plaintiff: "was very angry, agitated, [and] upset"; was yelling, arguing about why the case was taken off calendar; and demanded to know why the matter was taken off calendar. Ms. Jones also told Commissioner Biderman that plaintiff said he "would be answering to God for what" had occurred. Commissioner Biderman understood plaintiff's remarks as a "veiled reference" to his homosexuality. Commissioner Biderman "felt sick about" plaintiff's remarks. Commissioner Biderman testified he: "felt very personally insulted"; "was very upset about it"; and "was in shock about the whole thing." Commissioner Biderman reported the incident to Judge Stephanie Sauter. Judge Sauter in turn reported the matter to plaintiff's supervisor, Maureen Siegel. Maureen Siegel reported the incident to Earl Thomas. Mr. Thomas reported what had occurred to Chief Deputy City Attorney Terree Bowers.

Pet. App. at pp. 18-19.

With respect to Petitioner's admissions and this testimony the California Court of Appeal held that there, "was sufficient evidence defendant had a legitimate, non-retaliatory reason for terminating plaintiff's employment as a deputy city attorney." Pet. App. at p. 19.

Therefore contrary to the misstatement in the petition, the Court of Appeal decision does not depend on the "strength and credibility" of Justice Zelon.

REASONS FOR NOT GRANTING THE PETITION

The petition for writ of certiorari should be denied because this Court lacks jurisdiction to reach the constitutional issue that the petition presents. However, in the event that the Court nevertheless determines that it has jurisdiction, the Court should deny the petition. Petitioner has not demonstrated any compelling reason why this Court should exercise its discretion to accept the petition, nor has petitioner demonstrated that a question of substantial constitutional importance is presented.

A. This Court Lacks Jurisdiction.

California Code of Judicial Ethics, Canon 2(A) provides: "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

"The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality and competence." California Code of Judicial Ethics, Canon 2, Advisory Committee Commentary.

California Code of Judicial Ethics, Canon 3(E)(4)(c) provides that an appellate justice shall be disqualified if "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial. . . ." Each justice independently decides whether recusal is in order. *Kaufman v. Court of Appeal,* supra, 31 Cal.3d 933, 937-940.

Petitioner's recusal request was based on these provisions of state law. Pet. at p. 5. In denying the recusal request, therefore, Presiding Justice, Paul Turner understandably addressed only whether a reasonable person "would not entertain a doubt as to our capacity to remain impartial." Pet. App. at p. 65.

By failing to raise her due process theory in the court below, petitioner deprived the California courts of the opportunity to address it, but this Court is "a court of review, not of first view" *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005).

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the

> validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal law challenge to a state court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam). This Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981).

"Passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented." *Adams v. Robertson*, 520 U.S. 83, 89, n.3 (1997) (per curiam).

When the state court decision is silent on the federal issue, as in this case, this Court assumes that the issue was not properly presented to the highest

state court and the petitioner bears the burden of defeating this assumption "by demonstrating that the state court had 'fair opportunity to address the federal question. . . .'" *Adams*, 520 U.S. at 86-87 (quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981)).

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), Yee did not include a due process claim in his complaint, nor did he raise it in the California Court of Appeals. It was not until his petition for review to the California Supreme Court that Yee finally raised a substantive due process claim, but the California Supreme Court denied discretionary review. This Court stated that "[s]uch a denial, as in this Court, expresses no view as to the merits." *Id.* at 533. As such, this Court reasoned that the state court did not address the federal claim; therefore, the United States Supreme Court would not consider it. *Id.*

In the present case, Petitioner's due process claim was not presented to the California Court of Appeal and therefore Petitioner has failed to make the requisite jurisdictional showing required by both statute and Supreme Court precedent.

B. There Is No Compelling Reason For This Court To Exercise Its Discretion To Review This Case And Resolution Of The Issues Raised By *Caperton v. A.T. Massey Coal Co.* Will Not Aid Petitioner.

Supreme Court Rule 10 identifies certain considerations that bear upon whether the Court should

exercise its discretion to review a matter presented on a certiorari petition. These considerations do not suppose review in this case. The California Court of Appeal decision neither conflicts with any decisions of this Court, nor implicates a federal question that has not been decided by this Court.

This Court has held that a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955).

This Court has explained that bias in judicial decision making refers to "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate either because it is undeserved, . . . rests upon knowledge that the subject ought not to possess[,] . . . [or] is excessive in degree. . . ." *Liteky v. United States*, 510 U.S. 540, 550 (1994). In this context, the Court set forth the standard for finding judicial bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such

> a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555.

Petitioner offers only conjecture in support of her claim that the California Court of Appeal justices are impermissibly biased.[2]

The majority opinion does not reflect "a high degree" of favoritism or antagonism. In addition, the record in this case shows that petitioner's request for recusal was treated with considerable courtesy and respect.

In his response to petitioner's recusal request, Presiding Justice Turner stated that in the 1980's he, as a practicing attorney, moved to disqualify retired Presiding Justice Bernard Jefferson from sitting on a case when a petition for hearing was pending. Then Chief Justice Rose Bird recused herself from deciding the issue because she assigned Justice Jefferson to the case. Pet. App. at pp. 65. Presiding Justice Turner then wrote:

> Later, the remaining members of the court found that the assignment was contrary to law. At first, I cringed at the mere thought of

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[2] Petitioner theorizes as follows: "The majority's inevitable respect for their colleague Justice Zelon would lead a reasonable person to doubt the court's ability to be impartial in assessing the trustworthiness of that testimony. The justices should have recused themselves on the ground that '[a] judge must avoid all impropriety and appearance of impropriety.' ABA Model Code of Judicial Conduct, Canon 2(A) cmt." Pet. at p. 6.

> how Chief Justice Bird must have reacted when she even heard my name. But she continued to treat me with respect and affection in the years I remained as a lawyer and then later when I became a judge. The same is true in this case. It is your duty to have raised the disqualification question and I assure you that your performance of your obligation of your client is respected. (As to Retired Presiding Justice, Bernard Jefferson, whose assignment I challenged, we remained friends throughout the remainder of his life too.)

Pet. App. at pp. 65-66.

Finally, petitioner argues that,

> [i]n a case currently pending before this Court – *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 – [*Caperton v. A.T Massey Coal Co.*, 129 S.Ct. 593 (2008)] the Court will decide whether an appellate justice's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment by creating an appearance of bias . . .
>
> This Court's decision in *Caperton* will likely determine whether recusal was required under the circumstances of the present case.

Pet. at p. 7.

Any claim of bias must be supported by facts which would raise a reasonable inference of a lack of

impartiality on the part of the California Court of Appeal justices. *Caperton* raises the issue of whether the amount and timing of campaign contributions can be significant enough to establish the probability of bias.

Petitioner has failed to present any facts to support an inference of bias in this case. In the present case, Division Five's Presiding Justice, Paul Turner, denied petitioner's recusal request by stating, "[a]fter reviewing the facts as they are now evident, I have concluded that a person aware of the facts, including the states of minds of the four Division Five justices, would not entertain a doubt as to our capacity to remain impartial." Pet. App. at p. 65.

This conclusion comports with the fact that appellate judges, are called upon on an almost daily basis to review the decisions of other judges regardless of whether they sit on the same or another court; it is a routine part of their work and friendship or collegiality plays no part in their decisions.

The Second Circuit addressed a similar issue in *United States v. Colon*, 961 F.2d 41 (2d Cir. 1992). In this case the defendant argued that recusal of Judge Walker was required because the Second Circuit would be reluctant to reverse a sentence imposed by Judge Walker since he was now a member of that Court. The Second Circuit dismissed this argument stating, "citation is not necessary to recall that this Court has not hesitated to exercise its oversight responsibilities without regard to the fact that the decision being reviewed was rendered by a member of our bench." *Id.* at 44.

The California Court of Appeal decision is consistent with this holding. There is no reason to believe that this Court's decision in *Caperton* will mandate a different result.

CONCLUSION

For all of the foregoing reasons, the petition fails to state sufficient grounds for review by this Court, and should be denied.

Respectfully submitted,

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